(FEDERAL MARITIME COMMISSION)
(SERVED APRIL 16, 1990)
(EXCEPTIONS DUE 5-8-90)
(REPLIES TO EXCEPTIONS DUE 5-30-90)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1826

APPLICATION OF OOCL (USA) INC. FOR THE BENEFIT OF CONNELL BROS. COMPANY, LTD.

Application for permission to waive collection of freight charges in the aggregate amount of $1,098,195.66 granted.

Applicant carrier had intended to file an intermodal rate on bentonite clay moving from Memphis, Tennessee through West Coast ports on May 30, 1989, but continually filed the rate under the wrong column in its tariff, not filing it correctly until September 20, 1989. The errors subjected seven shipments to over $1 million in additional freight costs.

The application was filed on the 184th day after the date of sailing of the first shipment and cannot be granted for that shipment because of the jurisdictional limitation period of 180 days. This jurisdictional statute of limitations cannot be extended.

Applicant asks that the 180-day period be extended for the first shipment, arguing that applicant had relied on the advice of a Commission investigator and that it had, in effect, notified the investigator and therefore the Commission of the tariff error in question timely. Even if the jurisdictional statute of limitations could be extended for such reasons, the facts show that applicant was not diligent and had no reasonable basis to rely on oral advice of an investigator contrary to the specific requirements of law and the Commission's regulations specifying that an application had to be filed within 180 days.

David R. Kay and *Kevis Brownson* for applicant.

INITIAL DECISION[1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

This proceeding involves an application that was filed (mailed) on January 11, 1990, by Orient Overseas Container Line (OOCL), through its agent, OOCL (USA) Inc. In the application as later amended, OOCL seeks permission to waive collection of a total of $1,124,936.63 in freight charges in connection with seven shipments of bentonite clay which OOCL carried from Memphis, Tennessee to Manila, the Philippines, via the port of Long Beach, California on various ships sailing from Long Beach during July, August and September 1989, the first shipment sailing from Long Beach on July 11, 1989. Although not clear from the original application as to who would be the beneficiary of these waivers, according to later evidence, the beneficiaries on six shipments which moved freight collect were the named consignees, Saniwares Manufacturing Corp. on two shipments, Security Bank and Trust Company on three shipments, and the Bank of the Philippine Islands, on one shipment. On the remaining shipment, which moved freight prepaid, the beneficiary is Connell Bros., the shipper.

On six of the seven shipments in question, which sailed on or after August 1, 1989, and before September 20, 1989, the application was timely filed because these sailing dates all fall well within the 180-day period prior to the filing of the application (January 11, 1990) mandated by section 8(e)(4) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1707(e)(4). The new, corrective tariff was filed, as required by section 8(e)(2) of that Act, on September 20, 1989, and there is no evidence of other shipments affected by the tariff error in question or of discrimination among shippers, ports, or carriers.

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[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

The problems with the application, as originally filed, embraced two main categories, first, a serious inadequacy of the explanation of the purported tariff-filing error and insufficiency of supporting explanations and evidence in other respects, and, second, a serious problem because of the fact that the first shipment, which, according to the original application, sailed from Long Beach on July 12, 1989, appeared to have sailed 183 days before the filing of the application and therefore fell outside the permissible time period set forth in section 8(e)(4). By letter dated February 21, 1990, I directed OOCL's attention to these various problems and instructed OOCL to supplement the record with the necessary evidence and explanations relating to six specific problem areas.[2] Following service of this letter, OOCL retained counsel, and on March 21, 1990, counsel submitted comprehensive evidence and explanations in answer to the various questions posed. These materials consist of two detailed affidavits of knowledgeable OOCL employees, 27 attached exhibits comprising relevant contemporaneous company correspondence, tariff pages, bills of lading, and freight calculations. In addition, counsel presented arguments in support of granting the application for the apparently time-barred shipment. I find that this supplemental evidence and explanations, which have been assembled with evident care, to be ample and more than sufficient to justify the application for the six timely shipments. As for the early time-barred shipment, I find counsel's argument to be fully professional and well presented. However, I conclude that I am constrained by the law and Commission

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[2]The letter of February 21, 1990, specified six specific problem areas: 1) the problem with the first shipment, which appeared to be time-barred; 2) the inadequacy of the explanation of the purported tariff-filing error, which explanation consisted of one short paragraph which referred in conclusory fashion to "clerical error"; 3) lack of a table of calculations to verify the amount of requested waivers; 4) unclear explanation as to who were the beneficiaries of the waivers; 5) lack of explanation as to why the new, corrective tariff was filed in an amount different from the originally intended but unfiled rate; and 6) need for information as to when OOCL's tariff makes rate changes effective so that a proper tariff notice could be drafted to cover the first intermodal shipment if that shipment otherwise qualified.

precedent to deny the application as to that one shipment because of its failure to satisfy the non-waivable jurisdictional requirement that applications be filed not later than 180 days after shipment, which condition this particular shipment did not meet. Furthermore, I conclude that jurisdiction to grant the application for this first shipment cannot be conferred by means of the equitable estoppel or relation-back doctrines advanced by counsel.

The Tariff-Filing Errors

OOCL's explanation of the tariff-filing errors in question presented in the original application was seriously inadequate. However, as discussed, OOCL with the assistance of counsel, has provided a detailed, ample explanation which shows that OOCL did in fact commit several tariff-filing errors which qualify for relief under the special-docket law.

The key to understanding the following story of tariff-filing errors is to bear in mind that OOCL had wanted to file a rate on bentonite clay moving from Memphis, Tennessee to Manila, the Philippines, via its intermodal service through West Coast ports, designated as "IPI VIA WC" in its tariff, in the amount of $1855 per 20-foot container. Also, OOCL tried to file this rate effective May 30, 1989. However, despite this intention, OOCL made several unsuccessful attempts to file this intended rate in the tariff, first, by filing the $1855 rate in the wrong tariff column applicable to IPI movements via Atlantic and Gulf ports, effective May 30, 1989; and second, by filing the $1855 rate in the wrong section of the tariff and in the wrong column applicable to all-water movements from West Coast ports, effective July 7, 1989. It was not until September 20, 1989, that OOCL finally carried out its original intent by filing the rate of $1855 (which had in the meantime increased to $2045 because of a general rate increase (GRI) of September 1, 1989) in the proper section and column of the tariff, namely, "IPI VIA WC." Therefore, during the period when the subject seven shipments sailed, i.e., after July 7, 1989, and before September 20, 1989, the intended rate of $1855 PC 20 per 20-foot container was not filed where it belonged, in the column applicable to intermodal shipments moving from inland points such as Memphis, Tennessee, via West Coast ports such as Long Beach, California. This failure to file the intended rate in the proper column subjected seven shipments to over $1.1 million in additional freight charges based on the difference between the intended rate of $1855 per 20-foot container, inclusive of CY Receiving Charge, and a higher Cargo N.O.S. rate plus incidental charges.

A full and complete explanation of the events surrounding these various tariff-filing errors has been furnished in the form of affidavits of Mr. Stephen Luk, Tariff Supervisor of OOCL's agent in its Long Beach, California office, and by Ms. Kevis Brownson, Traffic Services Manager in the Oakland, California office. The story is somewhat detailed and involved. Thus, in April 1989, Ms. Brownson, in the Oakland office, was advised by OOCL's Manila and Hong Kong offices of an opportunity to carry bentonite clay from Memphis for Connell Bros. to Manila under a rate of around $1785 or $1795 per 20-foot container for shipments moving through the West Coast. In late April 1989, Ms. Brownson advised Donna Forminio, OOCL's East Coast Pricing Manager, of these rate requests but suggested that it would be better for OOCL economically if the movement were through the East Coast. However, Ms. Forminio agreed to cover bookings of bentonite clay through the East Coast for a limited time (30 days) at the lower West Coast quoted rates. Accordingly, on May 4, 1989, a rate of $1794 per 20-foot container was filed in the tariff for "IPI VIA AG" movements, i.e, for intermodal movements through Atlantic or Gulf ports. This rate, however, was to expire on June 2, 1989, with the understanding that OOCL would file a corresponding IPI rate for movement through West Coast ports for subsequent shipments.

On May 23, 1989, Ms. Brownson sent a written request to OOCL's Long Beach office requesting that it file a rate of $1795 per 20-foot container (plus a $60 general rate increase) effective June 1, 1989, so as to pick up movements of bentonite clay from Memphis through West Coast ports in view of the impending expiration of the intermodal Atlantic and Gulf intermodal rate on the clay. Despite the instruction to file a rate of $1855 for IPI WC movements, OOCL's typist mistakenly placed this rate in the tariff column for shipments moving IPI via Atlantic and Gulf ports, effective May 30, 1989. (See Exhibit No. 9, attached to the Brownson affidavit.) In addition, the typist caused the $1855 rate to expire on June 2, 1989, although such expiration date was supposed to apply only to the earlier $1794 rate via Atlantic and Gulf ports. (Brownson Affidavit at para. 8.)

Because of the above mistakes, therefore, as of June 3, 1989, OOCL's tariff had no specific commodity rate for bentonite clay moving intermodally from Memphis. OOCL attempted to correct this situation, first on June 8, 1989, but was unsuccessful because OOCL forgot to file the amount of the rate in the tariff. On July 7, 1989, OOCL again tried to correct the situation but failed to do so because it filed the $1855 rate under a column in the tariff applicable to all-water movements through West Coast ports, not to intermodal shipments from inland points like Memphis. (*Id.* at para. 9.) Effective September 18, 1989, OOCL increased the $1855 rate to $2045 because of a general rate increase that had occurred on September 1, 1989, but again OOCL filed the rate under the incorrect all-water WC column. (*Id.*)

On September 19, 1989, Ms. Brownson discovered that the rate was still not filed correctly and requested Mr. Luk, OOCL's Long Beach Tariff Supervisor, to file the rate correctly. Finally, effective September 20, 1989, OOCL filed the rate correctly under the "IPI VIA WC" column in the tariff, in the amount of $2045 PC 20 (the original $1855 plus a GRI of $190). This rate, had it been filed prior to the subject shipments in the then amount of $1855, would have applied to the shipments which had moved intermodally from Memphis, Tennessee to Long Beach, California, and thence to Manila.

There is no doubt that the errors, described above, which prevented OOCL from filing an intended rate of $1855 PC 20 in the correct tariff column were errors of a clerical or administrative nature that are remediable under section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1707(e), and the Commission's regulation, 46 CFR 502.92(a). The evidence is ample and detailed and shows that OOCL had the necessary intention prior to May 30, 1989, to file this rate so as to cover shipments moving from Memphis, Tennessee to Manila intermodally via West Coast ports, such as Long Beach, California. There is also no doubt that the failure to file the intended rate subjected all seven shipments to additional freight charges aggregating over $1.1 million, and that if all seven shipments fell within the permissible time period, OOCL should be permitted to waive collection of this aggregate amount. The problem, however, is that the first shipment admittedly sailed from Long Beach, California on July 11, 1989 and that this date is 184 days before OOCL filed (mailed) the application on January 11, 1990. As noted earlier, section 8(e)(4) of the 1984 Act requires applications to be filed with the Commission "within 180 days from the date of shipment." The question, therefore, is whether there is some way in which the Commission can retain jurisdiction to grant the application for the first shipment based on such doctrines as equitable estoppel or relation-back of the late-filed application to something earlier, or whether the 180-day period can be tolled for some other reason. I discuss that problem below. However, as to the last six shipments, the application qualifies. Accordingly, it is granted for those shipments.

Applicant shall file the following notice in an appropriate place in its tariff:[3]

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1826, that on shipments sailing from the port of loading on or after July 15, 1989, and effective through August 31, 1989, the rate on Bentonite Clay, From Memphis, TN, IPI VIA WC, was $1855 PC20; effective September 1, 1989 and continuing through September 19, 1989, inclusive, the rate was $2045 PC20. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodity described which may have been shipped during the specified period of time.

OOCL shall also waive collection of freight in the aggregate amount of $1,098,195.66, for the benefit of the consignees in shipments nos. 2, 3, 4, and 6, and the shipper in shipment no. 5. (See Brownson Affidavit at para. 11; Exhibit No. 27.)[4] As I discuss below, the application cannot be granted as to shipment no. 1 because of the statutory 180-day period of limitation. Therefore, it is necessary for OOCL to recover the undercharge on that shipment ($26,740.97). (See Exhibit No. 27.) OOCL shall notify the

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[3]Counsel for OOCL notes that it is necessary to draft a tariff notice that will apply to intermodal shipments received at inland terminals well before sailing dates from ports. In previous cases of this kind involving intermodal shipments and the 180-day period of limitation, it has been necessary to base the effective date of the notice on the date of sailing so that all intermodal shipments sailing within the 180-day period will be covered by the tariff notice, even if the shipment actually was received at an inland point outside the 180-day period. Therefore, the tariff notice in this case is made effective for shipments sailing on or after July 15, 1989, the 180th day before the filing of the application. (See SD 1821, *Application of TWRA and Sea-Land for Nomura Jimusho Inc.*, I.D. February 21, 1990, at 4 n. 3, F.M.C. notice of finality, March 29, 1990, and case cited therein.)

[4]Exhibit No. 27 contains a detailed table of calculations of the requested waivers on each shipment. It shows that the total freight under the applicable N.O.S. rate (plus ancillary charges) amounts to $1,204,189.63 for the seven shipments. The total sought freight under the $1855 PC20 rate (plus additional charges) amounts to $78,533.) However, OOCL failed to charge the B.A.F. (bunker adjustment factor) by mistake on shipments nos. 3, 4, and 5, in the aggregate amount of $720. Therefore, the total freight under the sought rate of $1855 PC20 plus ancillary charges is $79,253 ($78,533 plus $720). The difference between $1,204,189.63 and $79,253 is $1,124,936.63, the total amount of waivers that OOCL is seeking, as corrected from the original application. Because the waiver sought on the first shipment ($26,740.97) cannot be granted, the net amount of waivers that can be granted amounts to $1,098,195.66 ($1,124,936.63 less $26,740.97).

Commission's Secretary of the action taken in response to these instructions at such time as the Commission shall announce after the Commission has had an opportunity to review this initial decision on its own initiative or after the filing of exceptions.

Can the Commission Grant an Application Filed Beyond the 180-Day Period of Limitation Established by Law?

The above question has some monetary significance. If the first shipment is time-barred, that means that for that shipment OOCL must seek to recover some $26,740.97 in additional freight based on the freight due under the applicable tariff rate, amounting to $28,603.97, less the amount of freight collected by OOCL under the sought rate of $1855 per 20-foot container ($1,863). (See Exhibit No. 27.)

Counsel for OOCL presents cogent arguments in favor of granting the application for the otherwise time-barred shipment. He presents two main arguments. First, he contends that although the application should have been filed by Monday, January 8, 1990 (instead of January 11, 1990, when it was actually filed), the Commission had notice of the seven shipments in question and the tariff error affecting them before January 8. That is because, on January 5, 1990, OOCL had furnished relevant shipping documents on these matters to a Commission investigator in San Francisco who had requested them in connection with an informal investigation of OOCL's cargo rating. Therefore, OOCL had, in effect, filed the application with the investigator and had placed the Commission on notice of the tariff error and the need for a waiver. Also, the filing of the application on January 11, 1990, should relate back to the time of the submission of the relevant documents to the Commission's investigator.

The second argument of counsel is based on the doctrine of equitable estoppel. Thus, it is contended, OOCL submitted the shipping documents to the Commission's investigator in San Francisco on January 5, 1990, at a time when OOCL could still have filed an application directly with the Commission. However, it is argued, OOCL relied on the Commission's investigator, who advised that OOCL take no action until he reviewed the documents. The investigator, according to OOCL, did not get back to OOCL until January 10, 1990, when the time for filing an application had expired, and advised OOCL to commence a special-docket proceeding. On the very next day, OOCL mailed its application to the Commission.

The Argument that the Late-Filed Application Should Relate Back to January 5, 1990

Counsel cites a number of Commission and court cases holding that the modern view is to allow pleadings to relate back to earlier defective pleadings, the need to administer the remedial special-docket law liberally and without undue emphasis on technicalities, and a Commission decision which itself suggested that there may be some circumstances under which the Commission could allow an application which had been filed only a few days late to be granted.

OOCL's counsel is very able and thorough and one is tempted to yield to the careful arguments that he presents.[5] After all, is not the special-docket law remedial and should not the Commission administer it with flexibility so as not to harm an innocent shipper?

[5] As mentioned earlier, as originally filed, the application, which sought over $1 million in waivers, was seriously inadequate and required substantial supplementation with evidence and explanations. After counsel was retained by OOCL, OOCL filed thorough and comprehensive evidence and explanations showing that the application could be granted so as to authorize OOCL to waive collection of $1,098,195.66 in freight charges out of a total request of $1,124,936.63.

However, before deciding that the Commission should overlook the fact that the application was in fact filed 184 days after the July 11 sailing date of the first shipment and whether there are equities favoring OOCL, one should consider all the facts as well as previous decisions as to applicable law.

First, there is the doctrine that holds that later filed amended pleadings should be held to relate back to earlier pleadings when they do not change the essential nature of the claims asserted and do not thereby prejudice a defendant. Under this doctrine, a later pleading which is filed beyond the period of time permitted in a statute of limitations is nevertheless accepted and given effect. Such a doctrine is codified in the federal rules of civil procedure, Rule 15(c), 28 U.S.C.A., and the doctrine has been followed by the Commission to save a claim from being time-barred if a later amended complaint refers to the same conduct, transaction, or occurrence as that set forth in an earlier complaint. See *International Association of NVOCCs v. Atlantic Container Line*, 25 SRR 183, 194-195 (1989), affirming 24 SRR 1585 (ALJ 1989). The doctrine has been followed both in complaint cases and in special-docket applications filed with the Commission. Three cases cited by counsel for OOCL illustrate this fact, namely, *TDK Electronics Co. Ltd. v. Japan Lines, Ltd.*, 19 SRR 1724 (1980); *Application of Southern Pacific International, Inc. for the Benefit of General Motors Overseas Distribution Corp.*, 21 SRR 833 (1982); and *Rohm and Haas Co. v. Italian Line*, 21 SRR 212 (1981). In *TDK Electronics* and *Application of Southern Pacific*, two defective complaints and a defective special-docket application, respectively, were returned to the filing parties who later filed corrected versions. The Commission allowed a corrected complaint and applications to be filed even though the later filings occurred beyond the permissible statutes of limitation set forth in section 22 of the Shipping Act, 1916, and section 18(b)(3), fourth proviso, Shipping Act, 1916, the predecessor to section 8(e)(4) of the 1984 Act. In *Rohm and Haas*, the Commission permitted a complainant to amend its complaint that had been filed timely but was defective in regard to the standing of the named complainant. The amendment to the complaint corrected the standing problem even though the correction to the complaint occurred beyond the permissible two-year period of limitation set forth in section 22 of the 1916 Act. In allowing these later, corrected complaints and application to be filed outside the permissible period, the Commission followed the view that administrative pleadings are not to be subject to narrow technical rules and that amendments to such pleadings should be liberally permitted when they do not involve jurisdictional defects. (See discussion in *TDK Electronics*, cited above, 19 SRR at 1727-1728; see also *Application of Southern Pacific*, cited above, 21 SRR at 834-835.) However, even under this liberal doctrine, the commission expressed a caveat, namely, that the original defect that could be later cured, even if the correction occurred beyond the statutory period of limitation, "is not a jurisdictional defect that would normally bar the tolling of the statute of limitations, but rather a technical flaw that can be cured subsequently even if the statute had run." (*TDK Electronics*, 19 SRR at 1728, citing three previous decisions of the Commission.)

In all of the above cited cases, the parties had, in fact, originally filed a complaint or a special-docket application, that although defective or incomplete, had at least been filed as a pleading or application in something resembling the proper form. In other words, when allowing a later amendment or correction to relate back to the time of filing of the original complaint or special-docket application, the Commission was allowing the amended or corrected pleading to relate back to something that had been filed with the Commission's Secretary purporting to be a complaint or a special-docket application. But contrast that situation with the instant case. In the instant case, counsel for OOCL contends that because OOCL furnished a Commission investigator (Mr. Hal Rolnitzky of the Commission's San Francisco office) with certain documents pertaining to the subject shipments of clay for Connell Bros. with certain tariff pages, that submission in effect constituted notice to the Commission that there was a tariff error and a need for a waiver of freight charges. In other words, counsel analogizes the submission of shipping documents to the San Francisco investigator, who was looking into an informal "complaint" that OOCL had not applied its tariff properly, with the filing of a special-docket application with the Commission's Secretary in Washington, D.C. Therefore, counsel argues, the later filing of the actual special-docket application with the Commission's Secretary by mail on January 11, 1990, should be held to relate back to the furnishing of these shipping documents to the San Francisco investigator on January 5, 1990, when the 180-day period for filing applications had not yet expired. As liberal as the modern rules governing administrative pleadings are, I have nowhere found any authority which would consider such an informal submission of documents in response to an investigator's request to be the filing of a pleading with the agency. As discussed, all the cited cases involve the relation back of a later, corrected pleading to an earlier pleading filed in the proper place and in the proper form, albeit defective in some technical respect. I do not agree, therefore, that counsel's relation-back argument overcomes the effect of OOCL's late filing as regards the first of the seven subject shipments.

My conclusion that the informal submission of documents to a Commission investigator in San Francisco does not constitute the filing of a special-docket application or "notice" to the Commission that OOCL would be seeking permission to waive collection of freight charges because of tariff error is supported by the Supreme Court's decision in *Schweiker v. Hansen*, 450 U.S. 785 (1981). *Schweiker v. Hansen* also involved a remedial-type statute (social security). In the case, a mother visited a Social Security office and spoke with an employee there about filing a claim for "mother's insurance benefits." The government employee failed to advise her that she had to file a written application in order to obtain 12 months of retroactive benefits and misled her into believing that she was not entitled to such benefits. Later she discovered that under the applicable law and regulations, she was entitled and was required to file a written application and did so. Because she had been misinformed by the government employee, however, she claimed retroactive benefits going back 12 months before her first visit to the Social Security office. The agency denied these benefits and was reversed by the Court of Appeals. The Supreme Court, however, upheld the agency, holding, among other things, that the applicant's benefits could run only from the time of filing of the proper written application. (See 450 U.S. at 786-788.) The court refused to agree that the first visit of the applicant to the Social Security office was, in effect, the same as the filing of a written application. In this regard the Court stated (450 U.S. at 790):

> Congress expressly provided in the Act that only one who "has filed application" for benefits may receive them, and it delegated to [the agency] the task of providing by regulation the requisite manner of application. A court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits.

Of course, section 8(e) of the 1984 Act also requires that there be an "application of a carrier or shipper," and the Commission's implementing regulations, 46 CFR 502.92(a), require that a written application be filed in a certain way with the Commission's Secretary with payment of a filing fee and proper service, and set forth a form at the end of the regulation for applicants to follow. (See Exhibit No. 1 to Subpart F, following 46 CFR

502.95.) If the Supreme Court could not elevate an informal visit of a social security applicant to an agency office into an application, with consequent loss of 12-months' benefits, I do not see how OOCL's informal tendering of documents to a Commission investigator in San Francisco can be deemed to constitute the formal written application required by law and regulations.[6]

The second argument advanced by counsel is apparently based on a doctrine akin to that of equitable estoppel. Counsel argues that OOCL submitted the shipping documents to Mr. Rolnitzky in San Francisco on January 5, 1990, and that Mr. Rolnitzky, according to OOCL, did not advise OOCL to file a special-docket application until after he had reviewed the shipping documents, i.e., not until January 10, 1990. Therefore, it is argued, OOCL had relied on Mr. Rolnitzky to its detriment because by January 10, 1990, the 180-day period for filing an application had already expired as regards the first shipment of clay. There are serious problems with this second argument, however.

First, there is authority that holds that a statute like section 8(e) of the 1984 Act that imposes a special condition on a cause of action, which cause of action is created by the statute itself, is a jurisdictional condition and not a waivable statute of limitations.[7] In the jurisdictional-type statute of limitations, it has been held that the period of limitations

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[6] In deciding that the applicant who did not file a written application, as required by law, could not get benefits until she did so, the Supreme Court expressly agreed with Judge Friendly's dissenting opinion in the Court of Appeals decision, *Hansen v. Harris*, 619 F.2d 942, 949-958 (2d Cir. 1980). (See 450 U.S. at 788.) Judge Friendly cited two other cases in his dissenting opinion, in which two different Courts of Appeals had refused to allow benefits on the basis of unfiled oral visits or oral advice from Social Security employees. (See 619 F.2d at 952-953, citing *Leimbach v. Califano*, 596 F.2d 300 (8th Cir. 1979); and *Cheers v. Secretary of H.E.W.*, 610 F.2d 463 (7th Cir. 1979).)

[7] See *Application of Sea-Land for the Benefit of Pana-York*, 23 SRR 1153, 1156, and cases cited in note 8 therein (1986); 51 American Jurisprudence 2d, *Limitation of Actions*, secs. 15, 139; *Compagnie Generale Maritime v. S.E.L. Madura (Florida), Inc.*, 23 SRR 1085, 1091-1092 (ALJ 1986).

cannot be extended even in cases of fraud.[8] On the other hand, statutes of limitation which merely create defenses are procedural and can be waived or tolled for a variety of reasons.[9] The Commission has consistently held that the 180-day period of limitations applicable to special-docket applications is of the jurisdictional type, as I explain below.

In *Application of U.S. Atlantic and Gulf-Jamaica and Hispaniola Freight Association for Chiquita*, 22 SRR 1044, reconsideration denied, 22 SRR 1266 (1984), the Commission denied an application for certain shipments that fell outside the 180-day period permitted by the predecessor to section 8(e)(4) of the 1984 Act. In its original order (22 SRR at 1046), the Commission stated that "[b]ecause the 180-day limit is jurisdictional, relief in this case will be granted only on the five shipments made [within the 180-day period]." On reconsideration, the Commission not only confirmed its earlier order but rejected arguments that cited a court decision (*Nepera Chemical, Inc. v. FMC*, 662 F.2d 18 (D.C. Cir. 1981)) which had held that the Commission ought to administer the special-docket law liberally to effectuate its purposes. Moreover, the Commission overruled an earlier case that had allowed relief to be granted to early shipments otherwise time-barred if they had occurred in a stream of shipments, some of which fell within the 180-day period. The Commission, referring to the petition for reconsideration and the court's decision, stated as follows (22 SRR at 1267):

> The Petition would have the Commission apply a similar liberal construction of the jurisdictional requirement at issue here. However, unlike the statutory language involved in *Nepera* . . . 180 days is a precise term that is not amenable to a variety of interpretations. (Footnote citation omitted.) The Congress had to choose a cut-off date beyond which the Commission would

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[8]See *Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1040-1041 (D.C. Cir. 1986).

[9]See 51 American Jurisprudence 2d, Limitation of Actions, secs. 139 et seq.

> not be authorized to consider refund or waiver applications, in order to eliminate stale or dated claims. To a certain extent, such a date or time period will always be somewhat arbitrary and can lead to arbitrary results. Nevertheless, Congress has expressed its will by specifying a deadline of 180 days and the Commission does not believe the holding or rationale of *Nepera* would support a result in this case that evades or ignores that requirement.

The Commission has consistently followed the *Chiquita* rationale, holding that the 180-day period of limitation in the special-docket law is jurisdictional and refusing to waive the requirement. Thus, in *Application of Sea-land for the Benefit of Pana-York*, 23 SRR 1153 (1986), the Commission denied an application for certain shipments in a stream of shipments, which earlier shipments had occurred outside the 180-day period, even though those shipments had been subjected to a short-notice rate increase contrary to law. In its decision the Commission explained that the legislative history to the special-docket law showed that Congress had intended to prevent discrimination among shippers affected by tariff-filing errors but only for those shippers who had shipped during the 180-day period of limitation and that Congress had intended to eliminate stale claims by establishing the 180-day period. (*Pana-York*, 23 SRR at 1156 n. 7.) The Commission, furthermore, followed the principle that when a statute, such as section 8(e) of the 1984 Act, creates a new right and contains a time limitation, "the expiration of that time period extinguishes both the right and the remedy." (23 SRR at 1156, and cases cited in note 8.) The Commission stated, furthermore (23 SRR at 1156):

> Applied to Section 8(e) of the Act, this means that after the expiration of the 180-day period, the Commission no longer has the authority to allow refunds or waivers whether they be granted on the application or based on the tariff notice issued thereunder.

For additional cases showing that the Commission continues to consider the 180-day period of limitation to be a jurisdictional requirement that cannot be waived or extended, see *Application of Lykes for Embassy of Tunisia*, 23 SRR 1157 (1986); and *Application of Sea-Land for B.D.P. International, Inc.*, 24 SRR 128 (1987), applying the 180-day period of limitation to the conforming tariff notices filed by applicants when applications are granted. See also the discussion in *Application of Hoegh Lines for the Benefit of Tata Exports Ltd. et al.*, 24 SRR 533, 534-536 (I.D., F.M.C. notice of finality, October 27, 1987). In *Application of Hoegh Lines*, the application had to be denied for 75 shipments out of a total of 160 shipments affected by the tariff error in question because the 75 shipments occurred 198 days before the filing of the application. The decision considered the argument of the applicant that he had been unable to complete processing of the application for all 160 shipments within the 180-day period and the fact that the Commission itself had suggested in its *Chiquita* decision, cited above, that it might be possible to extend the 180-day period slightly for equitable reasons in certain circumstances. However, it was found that applicant probably could have avoided the problem had it been more efficient in preparing its application and that the Commission in cases after *Chiquita* no longer mentioned the possibility of extending the 180-day period. (See *Application of Hoegh Lines*, 24 SRR at 535 and 536 n. 6.)[10]

[10] In its *Chiquita* decision (22 SRR at 1267 n. 3), cited by counsel, the Commission had suggested that it might be possible to extend the 180-day period for only a few days if the carrier applicant gave a satisfactory explanation. The Commission also referred to a case in which the 180-day limitation was construed liberally to allow the application. (*Id.* at n. 2.) The case cited was *Application of Sea-Land for Tujague*, 22 SRR 619 (ALJ, F.M.C. Notice of Finality, February 15, 1984). In *Tujague*, the applicant filed on the 182nd day based on the carrier's misreading of the regulation and case law which led the carrier to believe that the 180 days started running from the date of loading of cargo at a second port. The case was specifically limited to its peculiar facts, was not to be used prospectively,a nd was based to some extent on unclear case law at the time as to which port of loading could be used when there was more than one. Even if OOCL could use the date of the second port of loading in the instant case (Oakland on July 13), the application would still be out of time (July 13, 1989 being 182 days before January 11, 1990). At least in *Tujague*, the application was filed on the 180th day after the loading at the second port. In view of the Commission's later silence on the possibility of extending the 180-day

It appears therefore that under applicable principles of law, the jurisdictional period of limitations set forth in section 8(e) of the 1984 Act cannot be waived, tolled, or extended. However, even if the doctrine of equitable estoppel could apply to such a statute and the period could be extended for equitable reasons, I do not find on this record that the equities lie on the side of OOCL.

As the detailed recitation of the various tariff-filing errors shows, OOCL had been attempting to correct its original May 30, 1989, tariff-filing error (when it filed the $1855 rate as "IPI VIA AG" rather than as "IPI VIA WC" and, incidentally, had caused that rate to expire on June 3, 1989). Thus, as discussed earlier, OOCL tried to correct this mistake on July 7, 1989, and again on September 8, 1989, but had filed the intended West Coast intermodal rate as an all-water West Coast rate ("WC"). Finally, on September 20, 1989, OOCL filed the rate as the intended West Coast intermodal rate ("IPA VIA WC"). During all of this period of time, OOCL had been receiving the shipments of bentonite clay moving from Memphis through Long Beach, California and had been rating the shipments on the bills of lading as if the intended West Coast intermodal rate had been correctly filed. Ms. Kevis Brownson, OOCL's Traffic Services Manager in Oakland, states that she discovered that the rate had still not been correctly filed by September 19, 1989, and promptly took steps to have it filed correctly. (Brownson Affidavit at para. 10.) She also states very frankly that "I was well aware of the tariff filing error on September 19, 1989, and should have filed a timely application for a waiver; but I was not familiar with the FMC Special Docket procedures or with the time limitation applicable thereto." (*Id.* at para. 15, last sentence.) She explains, however, that OOCL had left a conference (TWRA)

period even for equitable grounds, as mentioned in *Application of Hoegh Lines*, cited above, it is questionable whether the dictum in *Chiquita* still means what it says.

some time on or after March 1989, and had begun to file its own tariffs and rate changes as of May 15, 1989, utilizing its in-house staff, who were not experienced in such matters. While OOCL was a member of TWRA, OOCL had relied on TWRA's tariff publisher, Transax, to handle such matters. (*Id.* at para. 15.)

Apparently, therefore, OOCL is asking for the Commission's indulgence because of OOCL's inexperience in tariff-filing matters and in special-docket procedures and even though OOCL could have filed such an application any time from September 20, 1989, when it filed the corrective tariff and January 7 or 8, 1990, when the 180-day period for the first shipment received on July 11, 1989, expired.[11] Therefore, OOCL had at least 110 days to file such an application. (From September 20, 1989 to January 8, 1990, there are 110 days, i.e., over three and one-half months.) However, on November 30, 1989, she received a telephone call from Mr. Hal Rolnitzky, an investigator (with the Commission's San Francisco office) who requested certain tariff pages which she provided him on or about December 15, 1989. Mr. Rolnitzky subsequently advised that he would be visiting OOCL's Oakland office to investigate a "complaint" that OOCL had applied a rate for Connell Bros. that was not in the OOCL tariff. On January 5, 1990, Mr. Rolnitzky visited the Oakland office and was furnished with all the relevant tariff pages and bills of lading. At that time, Ms. Brownson informed Mr. Rolnitzky that she had other documents "that would clearly demonstrate that there had been an error." (*Id.* at para. 16.) Ms. Brownson then states that she took no further action because she relied on Mr. Rolnitzky's statement that he first wanted to review the documents and would get back to OOCL. The 180-day period for the

[11] January 7, 1990, the 180th day after July 11, 189, fell on a Sunday. Under the Commission's rules (46 CFR 502.101), when the last day for filing falls on a Sunday, a person is allowed to file on the next business day. It is not necessary to decide in this case whether a person could file on the 181st day because of the Commission's rule or whether a person should have filed on the preceding Friday, January 5, 1990, because OOCL actually filed on the 184th day (January 11, 1990).

July 11, 1989 shipment expired on Sunday, January 7, 1990. According to Ms. Brownson, on January 10, 1990, Mr. Rolnitzky called Ms. Brownson and suggested that OOCL should commence a special-docket proceeding, urging her to file on the next day, January 11, 1990, which she did. Ms. Brownson acknowledges, however, that "the relevant documents were submitted by OOCL to Mr. Rolnitzky establishing the error on January 5, 1990, well within 180 days from the first sailing." (*Id.* at para. 16.)

OOCL therefore is basing its argument on equities and is, in effect, asking that the 180-day period be tolled or that the Commission be estopped from denying that it can consider the application as regards the first July 11, 1989 shipment because of OOCL's reliance on Mr. Rolnitzky and the inexperience of its staff in filing special-docket applications. I cannot overlook the fact, however, that although TWRA's tariff publisher, Transax, may have been handling special-docket applications for OOCL until some time after March 1989, OOCL had only just recently filed three special-docket applications from its Long Beach office on October 4, 1989. As originally filed, these applications were seriously deficient and required many additional explanations before they could be granted. In fact, the deficiencies were so pronounced that OOCL was warned that its application would have to be denied unless substantial action was taken to correct the deficiencies. (See SD 1787, *Application of OOCL (USA) Inc. for the Benefit of Lamex International, Inc.*, Notice of Intent to Deny the Application, etc., 25 SRR 624 (ALJ November 3, 1989).) Furthermore, when the applications were finally granted in SD 1787 and two companion cases (SDs 1790, 1791), in an initial decision served on November 30, 1989, OOCL was specifically warned as follows (25 SRR 625, 626, I.D., F.M.C. Notice of Finality, January 5, 1990):

> However, it is hoped that in the future, OOCL will provide more complete explanations and supporting documentation with the original applications, including calculations of the amount of waivers or refunds and better explanations as to whether refunds or waivers are being sought. *Also, in future applications, the 180-day period may become critical.* (Emphasis added.)

Ms. Brownson has explained that OOCL's employees were inexperienced with special-docket applications, and I note that the applications in SD 1787, 1790, and 1791, were filed by the Long Beach office rather than the Oakland office. Nevertheless, it is somewhat disconcerting to note that in the very first application filed by OOCL after OOCL had received a specific admonition to watch out for the 180-day period, OOCL filed the application on the 184th day after the July 11, 1989 shipment.

It may be that Ms. Brownson and the OOCL staff were inexperienced with special-docket procedures. However, they knew enough to file a corrective tariff on September 20, 1989. Furthermore, although they took no action at that time to seek special-docket relief, over two months later, on November 30, 1989, Ms. Brownson was called by Mr. Rolnitzky in connection with the Connell Bros. bentonite clay shipments, and 15 days later she furnished Mr. Rolnitzky with relevant shipping documents. Surely this inquiry by the Commission investigator ought to have triggered some inquiries by Ms. Brownson as to the need to file a special-docket application. Had she called the Long Beach office or had she noted that OOCL had recently been warned about the 180-day period in SDs 1787, 1790, and 1791, she would certainly have learned that it was imperative for her to file an application on the subject shipment by January 7 or 8, 1990. Apparently, however, OOCL, having furnished documents to Mr. Rolnitzky on December 15, 1989, still did not check into the fact that the 180-day period was running and did not take any action even by January 5, 1990, when there was still time, even though Ms. Brownson states that on that date she had informed Mr. Rolnitzky that there had been an error.

Nevertheless, OOCL's counsel argues, OOCL did not file the application timely for the first shipment because it was awaiting advice from Mr. Rolnitzky who had told Ms. Brownson to take no further action until he reviewed the documents. Counsel argues that "[t]he delay was caused in part by OOCL's reliance upon the statement of the Commission's investigator." (See letter of counsel for OOCL, dated March 21, 1990, at 5.)

I find this argument to be a very thin reed on which to claim that the Commission ought to find that it retained jurisdiction to grant the application for the first shipment notwithstanding the expiration of the 180-day jurisdictional period. As discussed above, OOCL does not appear to have acted very diligently in ascertaining that they were under a 180-day requirement despite the warning in SDs 1787, 1790, and 1791, and the specific inquiries into the subject shipments by Mr. Rolnitzky. Nothing prevented OOCL from filing the application any time after September 20, 1989, and before January 7 or 8, 1990. The fact that a Commission investigator asked for documents and may have advised OOCL that he would get back to them does not excuse OOCL's dilatoriness in failing to filing timely. As discussed above in connection with the case of *Schweiker v. Hansen*, when Congress has specified a certain requirement (filing a written application), "a court is no more authorized to overlook the valid regulation . . . requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits." (450 U.S. at 790.) Furthermore, even if the government could be estopped and jurisdiction retained despite the lateness of a filing, the lack of diligence of a private party has been seen to be fatal. In Judge Friendly's dissenting opinion in *Hansen v. Harris*, cited above, 619 F.2d at 953, with which opinion the Supreme Court expressed its agreement in *Schweiker v. Hansen*, Judge Friendly stated:

> Despite his general dislike of the principle of no estoppel against the Government . . . Professor Kenneth Culp Davis has written very recently of [*Leimbach v. Califano*, cited above, 596 F.2d 300)], "A private party loses by lack of timely filing even though government employees misled him into believing that the filing was not required. The authorities the court cites support the decision, which is important because the pattern so often recurs." (Citation of source omitted.)

The lack of OOCL's diligence coupled with its purported reliance on a Commission investigator's advice, when OOCL knew or should have known that the investigator was not authorized to waive statutory requirements or was not responsible for the special-docket program, are additional factors which defeat OOCL's argument that the Commission should be estopped on equitable grounds even if the Commission could be estopped as a matter of law. Recent, as well as earlier Supreme Court decisions, make it extremely doubtful that the Government can be estopped generally. However, even if so, the elements of equitable estoppel must be present before the doctrine can be applied, including misleading affirmative conduct on the part of a government agent and reasonable reliance by the plaintiff. Thus, in *Heckler v. Community Health Services*, 467 U.S. 51 (1984), the Supreme Court held that a health care provider could not recover from the Government notwithstanding incorrect advice from a government agent because, among other reasons, the health care provider's reliance on the erroneous advice was held to be unreasonable. The Court held that the provider, who was a participant in the Medicare program, should have known better than to rely on the oral advice of the agent who was not authorized to resolve the critical question involved. In this regard the Court remarked (467 U.S. at 64-65):

> The relevant statute, regulations, and Reimbursement Manual, with which respondent [the provider] should have been and was acquainted, made that perfectly clear [i.e., that the Government agent could not resolve the critical policy question involved]. Yet respondent made no attempt to have the question resolved by petitioner [the Government agency]; it was satisfied with the policy judgment of a mere conduit. (Footnotes omitted.)

The Supreme Court was also highly critical of the health care provider's reliance on mere oral advice. (*Id.* at 65.) The Court stated (467 U.S. at 65-66):

> In sum, the regulations governing the cost reimbursement provisions of Medicare should and did put respondent on ample notice of the care with which its cost reports must be prepared, and the care which would be taken to review them within the relevant 3-year period. Yet respondent prepared those reports on the basis of an oral policy judgment by an official who, it should have known, was not in the business of making policy. That is not the kind of reasonable reliance that would even given rise to an estoppel against a private party. It therefore cannot estop the Government.

Heckler v. Community Health Services is cited because of similarities with the instant case, e.g., alleged reliance by OOCL, who participated in special-docket applications in the past, and who relied on the oral advice of an investigator, who, applicant should have known, was not responsible for advising carriers about special-docket regulations and could not authorize the 180-day period to be waived. Yet OOCL made no effort to file an application in the proper form with the Commission's Secretary in Washington despite having ample time to do so after September 20, 1989, and even after its Long Beach office had received specific warning about the need to watch out for the 180-day period. The case is also cited because it is a recent case in a line of Supreme court decisions in which the Supreme Court consistently holds that the Government is not a private party and cannot be estopped even when in a particular case someone suffers injury because of misleading advice given by a government agent. In the cited case, the health care provider was in fact reimbursed twice and was required to give back money to which it had not been entitled in the first place. However, in previous decisions of the Court, the plaintiff suffered significant injury because of reliance on erroneous advice of Government agents. Yet the Court held that the law had to be obeyed. See, e.g., *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947) (farmer denied payments under crop insurance policy after drought ruined his wheat crop); *Schweiker v. Hansen*, cited above, 450 U.S. 785 (mother lost 12 months of Social Security benefits); *Montana v. Kennedy*, 366 U.S. 308, 314-315 (1963) (petitioner denied citizenship because of erroneous advice of consular officer given to petitioner's mother who would have returned to United States to give birth to petitioner but for the erroneous advice).

There is no point in exploring at length the question whether under some circumstances the government can be estopped on equitable grounds in view of the strong views of the Supreme court opposing the idea.[12] That is because even if the doctrine could apply to estop the Commission, the facts do not show that the requisite elements of the doctrine (diligence on the part of OOCL, reasonable reliance on advice, etc.) are present. The fact remains that the Commission's jurisdiction has been limited by Congress to the

[12]There is a large body of law concerning the doctrine of equitable estoppel as against the Government, showing that some lower courts have in the past estopped the Government under particular equitable facts. See Annotation, *Estoppel Against Federal Government*, 27 ALR Fed 702-749; Davis, *Administrative Law of the Eighties* (1989 Supplement to treatise) Chapter 20. But there is also considerable authority holding that jurisdictional statutes of limitation cannot be waived or extended even for equitable reasons. See, e.g., *Cooley v. Director, OWCP, U.S. Dept. of Labor*, 895 F.2d 1301, 1303 (11th Cir. 1990) and cases cited therein (widow denied appeal because she filed appeal with Court of Appeals beyond the 60-day period allowed by law, although she had filed letter with agency about the appeal timely and agency had delayed advising her); *Hardin v. City Title & Escrow Co.*, cited above, 797 F.2d at 1040-1041 (jurisdictional statute of limitations will not be extended even if fraud had occurred). Even in the case of statutes of limitation that are not considered to be jurisdictional, and therefore are subject to tolling for equitable reasons or for fraud, the courts will not extend the time period if the plaintiff had not been diligent, and a person is held to know what he or she ought to know. (see 54 Corpus Juris Secundum, *Limitations of Actions*, sec. 89; see also *Hobson v. Wilson*, 737 F.2d 1, 33 (D.C. Cir. 1984) (equitable tolling of a statute of limitations has two elements, successful concealment by defendant and diligence by plaintiff).)

granting of relief to shipments which have occurred within a 180-day period, the first shipment involved in this application fell outside that period, and there is no authority by which the Commission can extend this period on the basis of the reasons advanced by OOCL. Although the result of this conclusion is that the consignee on the first shipment owes $26,740.97 in freight, overall the applications have been granted for over $1 million, and the same consignee of the first shipment (Saniwares Manufacturing Corp.) is being benefited by allowing a waiver on the second shipment, on which Saniwares was also the consignee, amounting to $106,988.39. (See Exhibit No. 27 and Brownson Affidavit at para. 11.) Denials of any applications are always regrettable, but it should be remembered that Saniwares could have filed its own application under section 8(e) of the 1984 Act and that in previous denials of applications, the shipper or consignee has ben required to pay even more additional freight money. (See, e.g., *Application of TWRA and Sea-Land for Bruce International Corp.*, 23 SRR 1693 (1987) involving $32,130.31 in freight charges which Sea-Land had sought to waive).

It is always regrettable when the Commission cannot grant a special-docket application because of a jurisdictional defect in the application, as in the present case regarding the first shipment. In a previous case in which the Commission had to deny the application because the applicant had failed to comply with another jurisdictional condition (the filing of the corrective, new tariff) the Commission stated:

> This requirement cannot be waived, and as much as the Commission might wish to grant relief in situations such as we have here, where the consequences of subsequent errors by the carrier fall upon the shipper, the Commission, whose jurisdiction is strictly limited by statute, has no power to grant the relief requested. *A.E. Staley Mfg. Co. v. Mamenic Line*, 20 F.M.C. 642, 643 (1978).

OOCL's counsel is very able and had done an excellent job in presenting OOCL's evidence and arguments, as I have commented previously. I conclude on the basis of Commission precedent and consideration of various equitable doctrines that OOCL's failure to file the application for the first shipment within the 180-day statutory period has deprived the Commission of jurisdiction to grant the application as regards that one shipment. OOCL's counsel is entitled to file exceptions to the Commission and present his equitable arguments for the Commission's consideration. There is nothing more that I can do for OOCL.

Norman D. Kline

Norman D. Kline
Administrative Law Judge

Washington, D.C.
April 16, 1990